

September 16, 2021

**STAFF MEMORANDUM**

TO: Public Service Commissioners  
FROM: Chet McLean, Grant Fink, Zack Rogala  
SUBJECT: Docket 2020.03.033 – The Commission’s Implementation of HB 467

**PURPOSE**

To implement HB 467, the Montana Energy Impact Assistance Act (“Act”), enacted by 2019 Montana Legislature.

**BACKGROUND**

HB 467 encourages and facilitates the use of securitized, ratepayer-backed Montana Energy Impact Assistance (“MEIA”) bonds to address and lower the costs associated with the retirement and/or replacement of electric infrastructure. The Bill is codified at Mont. Code Ann. §§ 69-3-1601 through 69-3-1623, and contains a number of new definitions and outlines the information that must be included when utilities apply for financing orders with the Commission (Mont. Code Ann. §§ 69-3-1603 and -1605), requirements that must be included in the financing order (Mont. Code Ann. § 69-3-1606), and criteria for Commission approval of financing orders (Mont. Code Ann. § 69-3-1606). The Commission is required to adopt rules to implement HB 497.

The statute requires that the Commission adopt rules to guide the MEIA bond and financing order processes. The rules must establish (1) guidelines consistent with the purpose and objectives of the Act for meeting Montana’s electricity supply resource needs and managing the portfolio of electricity supply resources; (2) minimum filing requirements; and (3) penalties for failure to disclose to customers on their bills the non-bypassable charges for energy impact assistance and the overall impact to rates of the retirement or replacement of affected infrastructure (to be communicated on an annual basis).

To determine the proper implementation of HB 467, the Commission initiated a docket and requested comments from the regulated public. On March 17, 2021, the Commission issued a *Notice of Opportunity to Comment* and requested comments from interested persons regarding the Commission administrative rules that will be created to implement the provisions of HB 497.

The Commission requested responses to the Notice by May 8, 2021, and received comments from NorthWestern Energy (“NorthWestern”) and Montana-Dakota Utilities (“MDU”).

The comments and staff recommendations are summarized below.

## **DISCUSSION AND RECOMMENDATIONS**

This section summarizes the comments of each of the interested parties and discusses staff's recommendations. Attachment A to the memo provides the notice of public hearing on the proposed adoption reflective of staff's recommendations.

### ***I. Minimum Filing Requirements***

The Commission requested parties to respond to the following: (a) What information is sufficient to meet the financing order requirements as set forth in the Act; (b) Should the minimum filing requirements expand the statutorily-required information for financing order requests and, if so how and why; (c) How can the Commission ensure the Act is uniformly applied to all jurisdictional electric utilities; and (d) How should the Commission determine whether the requirements for issuing a financing order have been met?

Regarding (a), MDU notes that the information identified by Mont. Code Ann. § 69-6-1605(3) is adequate, and that no additional material is necessary to establish Commission minimum filing requirements.<sup>1</sup> NorthWestern agrees and adds that requirements in Mont. Code Ann. § 69-6-1606 are also relevant.<sup>2</sup> NorthWestern notes that HB 467 is optional, not mandatory, and if "the Commission expands the filing requirements beyond that provided for in the statute and necessary to support the required findings, utilities will be less likely to use" the tool.<sup>3</sup>

Regarding (b), MDU notes that the Commission should not expand the minimum filing requirements by rule. The Commission's rules "should focus on setting forth the data required to satisfy the requirements as consolidated from the definitions and substantive provisions" because the Act's definitions "set forth substantive requirements which would be appropriate to clarify in rule." MDU provides examples: "it would be appropriate for a rule to detail how to calculate and report the 'pretax costs' sought to be included in financing," or it would be helpful to explain what data is needed to establish a net present savings from proposed financing mechanism contemplated by Mont. Code Ann. § 69-3-1605(3)(e), including "the actual undepreciated value at issue, the other costs sought to be included in the financing, as well as the underlying assumptions used in the two financing mechanisms being compared."<sup>4</sup>

Regarding (c), MDU notes that the Act applies to all jurisdictional utilities, so it can apply the Act uniformly "by fairly and consistently applying the standards articulated in the Act to its consideration of any and all applications."<sup>5</sup> NorthWestern agrees.<sup>6</sup>

Regarding (d), MDU notes that the Act anticipates resolving specific requests in a contested case hearing, which renders the need for regulations on this issue unnecessary.<sup>7</sup>

---

<sup>1</sup> MDU Comments at 1.

<sup>2</sup> NorthWestern Comments at 3.

<sup>3</sup> *Id.*

<sup>4</sup> MDU Comments at 1-2.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> NorthWestern Comments at 4.

<sup>7</sup> MDU Comments at 2.

Staff recommends the Commission align the minimum filing requirements with those already required for typical rate case applications established in Mont. Admin. R(s). 38.5.101 through .195. This provides a general framework to guide utility applications that may impact various aspects of a utility revenue requirement. The use of the term “generally” is meant to avoid strict conformity with the current minimum filing requirements, which were not enacted to address the financing mechanisms provided by the Montana Energy Impact Assistance Act.

## *II. Objectives of the Act*

The Commission requested parties to respond to the following: How should the Commission ensure that a Commission-issued energy impact assistance bonds and financing order process meets Montana’s electric supply resource needs and aids in managing the portfolio of electricity supply resources?

MDU notes that the Act “is complementary and supplementary to, rather than a replacement of, the resource planning process.”<sup>8</sup> To that end, the Commission should continue to rely on its existing resource planning processes “as the primary means to review identification of needs and management of resources continually carried out by utility management.”<sup>9</sup> This process “should focus on the comparison of traditional financing methodologies with securitization rather than on identification of resources.” Accordingly, it would be appropriate for the Commission’s new rules “to cross refer to the Commission’s resource planning rules.”<sup>10</sup>

NorthWestern requests the Commission make the financing order process “as predictable and knowable as possible to encourage the use of financing orders.”<sup>11</sup> For example, the Commission “should provide guidance for utilities on how to balance the mandates of and contradictions between” the Integrated Least Cost Planning and Acquisition Act and HB 467: “Since both acts were modified in the same legislative session, and neither referenced the legislation affecting the other part, the Commission should provide guidance.”<sup>12</sup> Similarly, the Commission “should not use HB 467 to do anything other than provide an optional process for utilities to consider,” and that the Act “may aid in handling stranded assets, but it cannot replace the mandates of the IRP Act.”<sup>13</sup>

Staff recommends the Commission align MEIA Financing with traditional least-cost planning principles to ensure that financing orders are subject to similar cost-effectiveness evaluations that apply to utility resource planning decisions. Staff recommends the Commission decline to provide specific guidelines for financing orders because those guidelines would be premature at this time. The Commission may revisit the guidelines if or when the Commission has administered financing orders under the Act.

---

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> NorthWestern Comments at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

### III. Penalties

The Commission requested parties to respond to the following: What process should the Commission use to develop and assess penalties that may be required under the Act?

MDU notes that the appropriate process is to establish rules describing the penalty process. It could be appropriate to adopt a similar standard from other Commission penalty statutes for violations of Mont. Code Ann. § 69-3-1616 (contemplated by Mont. Code Ann. § 69-3-1604(2)(c)).<sup>14</sup> For example, it “is not clear how a utility could or why they would violate subsections (1)(a) or (b) or what the customer impact of such violation would be, so a process by which the Commission would provide an opportunity to cure any notice failures, then impose some type of fine for continuing violations would be appropriate.”<sup>15</sup>

NorthWestern notes that the Commission’s penalty statutes (i.e., Mont. Code Ann. § 69-3-206, -207, -209) require the Commission to go to court to collect any fine or penalty because the Commission lacks judicial powers.<sup>16</sup> Accordingly, NorthWestern comments that the Commission may not collect penalties for violating HB 467, but rather “it may determine the amount of a proposed penalty and ask a court to impose it.”<sup>17</sup> NorthWestern continues: “To fully inform utilities of its intentions, the Commission should set forth the penalty that it would ask a court to impose on a utility for violating § 69-3-1616, MCA (2019), including how the Commission would calculate the penalty.”<sup>18</sup>

Staff recommends the Commission take a general approach on this issue, as opposed to identifying specific methodologies. For example, the Commission should initiate a rulemaking proceeding to establish a new rule as follows: “Violations of Mont. Code Ann. § 69-3-1616 are subject to a Commission penalty. A penalty shall be reasonable, based on the amount-in-controversy, and specific to facts and circumstances presented for each violation. Penalty amounts shall be determined after providing parties an opportunity to appear and be heard. Penalties shall be recovered from electric utilities under the procedure required by Mont. Code Ann. § 69-3-206(2).”

This ensures that the Commission has the flexibility to craft penalties based on the relevant issues presented. Because financing orders for potentially stranded assets could involve substantial financial impacts, the Commission should ensure that its power to establish penalties is similarly broad.

---

<sup>14</sup> MDU Comments at 3.

<sup>15</sup> *Id.*

<sup>16</sup> NorthWestern Comments at 4–5 (*citing* Mont. Code Ann. § 69-3-103).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

#### *IV. General Remarks*

NorthWestern notes that the bill sponsor noted that HB 467 was presented as a potential opportunity to lower utility customer costs associated with stranded generation assets and that during hearings, Colstrip Unit 4 was identified as a potential stranded asset.

NorthWestern “strenuously disagrees with the claims that CU4 is a potential stranded asset in the near future.”<sup>19</sup> To the point, in 2019, CU4 generation was “equivalent to 23% of NorthWestern’s sales to ultimate customers in Montana during the year,” with “remarkably low and stable” fuel costs ranging from \$0.016 to \$0.017/kWh from 2017–2019.<sup>20</sup> These fuel costs “contributed significantly to the decrease in supply rates,” and NorthWestern “does not anticipate having any stranded assets associated with CU4 for many years, if ever. HB 467 may not have any impact on CU4.”<sup>21</sup>

Though, NorthWestern notes that stranded assets “that have been devoted to utility service create special concerns for utilities and regulating commissions that must balance the interests of utility customers and utility investors. NorthWestern notes that “the best way to handle stranded assets is to provide for accelerated depreciation once a retirement date is set.” Although this approach “may be more costly for a few years,” it is preferable because it results in “rapidly declining rates and aligns the cost of the asset to the customers using its output.”<sup>22</sup> That is compared to HB 467 “that may lower the annual cost of the stranded assets but raise it over the life of the revenue bonds that are securitized by a dedicated revenue stream from a special charge.”<sup>23</sup>

---

<sup>19</sup> NorthWestern Comments at 1.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*